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No. 00-886

IN THE

# Supreme Court of the United States

JENNY MANYBEADS, *et al.*,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## MOTION OF THE HOPI TRIBE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

Pursuant to S. Ct. R. 37.2(b), the Hopi Tribe ("the Tribe") respectfully moves for leave to file an *amicus curiae* brief in opposition to the petition for a writ of certiorari in *Manybeads v. United States*. In accordance with S. Ct. R. 37.2(b), this motion is submitted as one document with the brief sought to be filed.

## PARTIES WHO HAVE WITHHELD CONSENT

Petitioners, Jenny Manybeads *et al.*, have withheld their consent. Respondents, the United States of America *et al.*, have granted consent to the filing of this brief.

## NATURE OF THE MOVANT'S INTEREST

The Tribe is vitally interested in the outcome of this litigation. The relief sought by the Plaintiffs, if granted, would jeopardize the Tribe's rights to the land granted it by the Navajo-Hopi Land Settlement Act of 1974 and its rights under the Accommodation Agreements which have already been ratified by Congress and signed by Navajo families residing on the Hopi Partitioned Lands ("HPL"). This suit threatens to disrupt and delay the implementation of a final, decades-old judicial decree that partitioned disputed lands and the concomitant relocation of Navajos from Hopi lands.

The Tribe has a legally protected interest in the land at issue here, which constitutes an approximately 1.8 million-acre area in northeastern Arizona that has been the subject of several acts of Congress and over forty years of litigation. *See, e.g., Clinton v. Babbitt*, 180 F.3d 1081, 1083-85 & n.2 (9th Cir. 1999) (summarizing the dispute and providing a partial listing of the resulting Ninth Circuit opinions). The dispute dates back to an 1882 Executive Order, *see Healing v. Jones*, 210 F. Supp. 125, 129 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963), and has continued to the present day. The *Healing* decision granted the Tribe exclusive use of a portion

of the 1882 Reservation, and the Tribe and the Navajo Nation ("the Nation") joint undivided interests in the remaining area of approximately 1.8 million acres (the "Joint Use Area"). *See id.* at 191-92. When joint use proved a failure, Congress, in the Navajo-Hopi Land Settlement Act of 1974, Pub. L. No. 93-531, 88 Stat. 1712 (codified as amended at 25 U.S.C. §§ 640d to 640d-31 (1994)), provided for the eventual partition of the Joint Use Area, granting half of the land to the Nation, and relocation of members of one tribe residing on land partitioned to the other. *See Sekaquaptewa v. MacDonald*, 626 F.2d 113, 119 (9th Cir. 1980) (affirming the partition).

Following partition, all Hopis residing on Navajo Partitioned Lands, and most Navajos residing on the HPL, relocated, receiving benefits from a statutorily-created commission. *See* 25 U.S.C. §§ 640d-11 to –14 (establishing the relocation commission and providing for relocation benefits). A small group of Navajos, including Petitioners, remains on the HPL. Petitioners initiated this lawsuit in 1988, claiming that the 1974 Act's partition and relocation provisions violate their constitutional rights, and seeking to remain indefinitely on the HPL. The district court dismissed Petitioners' suit on the merits, *see Manybeads v. United States*, 730 F. Supp. 1515 (D. Ariz. 1989), and Petitioners appealed the dismissal of their free exercise and equal protection claims. Pursuant to an order of the Ninth Circuit Court of Appeals, from 1991 to 1996, the Tribe participated in negotiations with Petitioners, the United States, and others, resulting in a Settlement Agreement and Accommodation Agreement ratified by Congress in 1996. These Agreements settle various claims by the Tribe against the government for its failures to protect the Tribe's interests in the HPL, while permitting HPL Navajos to remain on the HPL pursuant to 75-year leases.

The Tribe has a legally-protected interest both in regaining exclusive use of the HPL and in resolution of the long-standing Navajo-Hopi land dispute. This litigation, in which Petitioners claim an unrestricted interest in extensive portions of the HPL, threatens the Tribe's core sovereignty interests in use and control of its own lands, as well as threatening a settlement arrived at through decades of congressionally- and judicially-mandated negotiation and compromise.

## REASONS FOR GRANTING THE MOTION

An opportunity for the Hopi Tribe to be heard in support of its interests is essential for just resolution of the matter. Two of Petitioners' three questions presented represent assaults on the sovereign immunity of the Tribe: a claim that as a matter of law the Tribe lacks such immunity as to prospective and declaratory relief, and a claim that the Tribe has waived such immunity. Because the United States has changed its position to oppose the Tribe's indispensability claim, if the Tribe is not allowed to participate as an *amicus curiae*, no one will present arguments defending the Tribe's core interest in its own sovereignty. Indeed, it is quite possible that none of the parties will present arguments in support of the decision of the Ninth Circuit. In essence, the Tribe's vital interests would be decided in a suit between two parties both advancing views adverse to those interests.

Of even greater importance is the subject matter of this litigation. At the core of this lawsuit is a claim by Navajo residents for permanent and effectively unlimited dominion over Hopi lands. The Hopi Tribe's attempt to regain control of the precise lands in question has been at the core of decades of litigation and legislation. *See Clinton*, 180 F.3d at 1089 ("The Hopi tribe . . . has a legally protected interest in regaining jurisdiction over the Hopi Partitioned Lands." (citations omitted)). Indeed, the court of appeals below recognized that the Hopi Tribe is not merely necessary but

indispensable to resolution of the instant litigation. Now, however, both plaintiffs and the United States assert that the Tribe need not be heard in this litigation. Indeed, plaintiffs have withheld their consent that the Tribe participate as an *amicus curiae*. Presumably, they would present the Tribe with an impossible choice: either to be without a voice in this litigation over its vital interests, or else to intervene in the litigation at the potential cost of waiver of its sovereign immunity. "It is wholly at odds with the policy of tribal immunity to put the tribe to this Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it." *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986).

It would be unjust to deprive the Tribe of the opportunity to be heard in support of its interest in regaining jurisdiction and control over the HPL and the sanctity of its sovereign immunity. The Tribe therefore respectfully moves for leave to file an *amicus curiae* brief before the Court's consideration of the petition for a writ of certiorari in this case.

Respectfully submitted,

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*Amicus curiae* the Hopi Tribe ("the Tribe")[1] respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Ninth Circuit's opinion in this case, *Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000) ("*Manybeads II*").

## STATUTES INVOLVED

Although the Court of Appeals affirmed the dismissal of Petitioners' suit based on Fed. R. Civ. P. 19, this case involves two federal statutes: the Navajo-Hopi Land Settlement Act of 1974, Pub. L. 93-531, 88 Stat. 1712 (codified as amended at 25 U.S.C. §§ 640d to 640d-31) ("the 1974 Settlement Act"); and the Navajo-Hopi Land Dispute Settlement Act of 1996, Pub. L. 104-301, 110 Stat. 3649 (as amended by Pub. L. 105-256, § 3, 112 Stat. 1897 (1998)) ("the 1996 Settlement Act"). The pertinent text of these statutes is set forth in the Appendix attached hereto, p. 1a, *infra*.

## STATEMENT OF THE CASE

Congress enacted the 1974 Settlement Act to resolve the long-standing dispute between the Tribe and the Navajo Nation ("the Nation") concerning a 1.8 million-acre tract in northeast Arizona known as the Joint Use Area. Congress provided in that act for an eventual court partition of the Joint Use Area, and, in 1979, the United States District Court for the District of Arizona partitioned approximately 900,000 acres known as the Hopi Partitioned Lands ("HPL") to the Tribe, and approximately 900,000 acres known as the Navajo Partitioned Lands ("NPL") to the Nation. *See Sekaquaptewa v. MacDonald*, 626 F.2d 113, 119 (9th Cir. 1980) (affirming the partition).

Under the 1974 Settlement Act, members of each tribe were required to move from the lands partitioned to the other tribe. All of the few Hopis residing on the NPL voluntarily relocated, and thousands of Navajos residing on the HPL (the "HPL Navajos") also moved. In 1988, some of the remaining HPL

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1. Counsel for the Tribe are the sole authors of this brief and no person or entity other than the Tribe made a financial contribution to the preparation and submission of this brief.

Navajos filed suit against the United States, claiming that the relocation provisions of the 1974 Settlement Act were unconstitutional. *See Manybeads v. United States*, 730 F. Supp. 1515 (D. Ariz. 1988) ("*Manybeads I*"). In support of its motion to dismiss, the United States argued that the Tribe was a necessary and indispensable party to this lawsuit under Fed. R. Civ. P. 19. *See* Memorandum of the United States in Support of Its Motion to Dismiss at 39, *Manybeads I* (No. CIV 88-410). The district court dismissed the lawsuit on its merits, *see Manybeads I*, 730 F. Supp. at 1522, but on appeal the United States Ninth Circuit Court of Appeals ordered the parties to enter into mediation. This resulted in two agreements: the "Accommodation Agreement" and the "Settlement Agreement."

The Accommodation Agreement permits certain HPL Navajos to enter into a 75-year lease term with the Tribe. Pursuant to the Accommodation Agreement, the HPL Navajos are assured a three-acre homesite, up to ten acres of farmland, and the right to continue using the land for the traditional (including religious) uses they were then making of the HPL. An overwhelming majority of HPL Navajos have signed Accommodation Agreements; those choosing not to sign must relocate pursuant to the 1974 Settlement Act.

Pursuant to the Settlement Agreement, the Tribe agreed to dismiss several claims against the United States and abide by the terms of the Accommodation Agreement. In return for the Settlement Agreement, the United States agreed to provide the Tribe a compensation package totaling $50.2 million, and including up to 500,000 acres of land.

Congress ratified both the Accommodation and Settlement Agreements in the 1996 Settlement Act. *See* S. Rep. No. 104-363 at 1 (1996). Pursuant to the Settlement Agreement, the Tribe has dismissed its claims against the United States.

The 1974 Settlement Act and these agreements conferred legal rights and benefits on the Tribe, which would be adversely affected if relocation were declared unconstitutional. In particular, if the Plaintiffs obtain the relief they seek

(1) the Navajos who have refused to sign Accommodation Agreements would assert a right to remain on Hopi land—despite Congress's promise in both the 1974 and 1996 Settlement Acts that the Hopi Tribe, through relocation, would recover the ownership, use and possession of its land, and (2) the Navajos who have signed Accommodation Agreements would claim they need not abide by them. The Tribe's legal rights to the HPL and its rights under the agreements would thus be jeopardized, and the years of negotiations that began with the Ninth Circuit's 1991 order and led to the Settlement and Accommodation Agreements ratified by Congress in 1996 would have been for naught.

Following ratification of the 1996 Settlement Act, Petitioners' appeal proceeded with the court of appeals requesting supplemental briefing on the issue of whether the Tribe is an indispensable party to this lawsuit. The United States, reversing its prior position, argued that the Tribe is not a necessary party "because, although the Tribe has legally protected interests at stake, in this case the United States adequately represents the interests of the absent Tribe." Supplemental Brief of the Federal Appellants on the Indispensable Party Issue at 4, *Manybeads II* (No. 90-15003).

The court of appeals affirmed the district court's dismissal of Petitioners' suit on the ground that the Tribe was a necessary and indispensable party who could not be joined due to its sovereign immunity. *See Manybeads II*, 209 F.3d at 1166-67. The Ninth Circuit found that the Tribe's joinder was necessary pursuant to Rule 19(a)(1), which provides that a party is necessary if in its absence "complete relief cannot be accorded among those already parties," holding that "Manybeads cannot be afforded complete relief without undoing the Accommodation Agreement . . . and without undoing the Settlement Agreement," *Manybeads II*, 209 F.3d at 1166. It further found the Tribe's joinder necessary pursuant to Rule 19(a)(2) because the Tribe " 'claims an interest relating to the subject of the action and is so situated that the disposition of the action may [i] as a practical matter impair or impede' its

ability to protect that interest," *Manybeads*, 209 F.3d at 1166 (quoting Fed. R. Civ. P. 19(a)(2)(i)). The court of appeals then applied the indispensability analysis of Fed. R. Civ. P. 19(b), and, concluding that equitable factors favored dismissal, affirmed the judgment of the district court. *See id.* at 1166-67.

## OBJECTIONS TO THE PETITION TO GRANT THE WRIT

### I. The United States Court of Appeals for the Ninth Circuit was not presented with the argument that tribal sovereign immunity should not extend to suits for declaratory or injunctive relief. Nor can the implicit decision by the Ninth Circuit not to abrogate tribal sovereign immunity in such a fashion reasonably be construed as in conflict with decisions of the Fifth, Eighth, Tenth, or Eleventh Circuit Courts of Appeals.

The petition for a writ of certiorari should be denied because it seeks review of an issue not presented by Petitioners below nor addressed by the Court of Appeals, and implicates no legitimate conflict between United States Courts of Appeals.

As an initial matter, the Tribe objects to Petitioners' assertion that the Court of Appeals "failed to address the issue of the Tribe's sovereign immunity as it relates to the nature of Petitioners' claims and the relief requested." Petition for Writ of Certiorari at 11. The Ninth Circuit's failure to address the issue is a direct result of the Petitioners' failure to request the court to abrogate tribal sovereign immunity in actions for prospective and declaratory relief. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (citations omitted). Considering this Court's recent reaffirmation in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), that the limits of tribal sovereign immunity are for Congress to modify, this case presents no exceptional reason for departure from the Court's ordinary rule.

Nevertheless, the Tribe would like to take this opportunity to dispel any potential misperception that there exists a conflict among the United States Courts of Appeals on the question of the

applicability of tribal sovereign immunity to suits for injunctive or declaratory relief. First, since the Ninth Circuit in this case did not address the question, its silence on the matter cannot reasonably be seen as in conflict with the decision of another circuit. Second, even assuming *arguendo* that the *Manybeads II* opinion can be read as an implicit decision not to abrogate tribal sovereign immunity, such a decision is fully consistent with the decisions of this Court as well as the United States Courts of Appeals for the Eighth, Tenth, and Eleventh Circuits. Third, most of the cases cited by Petitioner address the extent of Congress's abrogation of tribal sovereign immunity under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21 (1994) ("IGRA"), and as such have no bearing on the scope of that immunity absent such abrogation. Fourth and finally, although a cursory reading of the opinion in *TTEA v. Ysleta del sur Pueblo*, 181 F.3d 676 (5th Cir. 1999), might appear to create a conflict, the Fifth Circuit's opinion is more reasonably read to endorse the well-established proposition that it is only tribal *officers*, not tribes themselves, who fail to enjoy the protection of tribal sovereign immunity in suits for declaratory or injunctive relief. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978).

The decision below is fully consistent with *Santa Clara Pueblo* — a suit "seeking declaratory and injunctive relief," 436 U.S. at 51 — wherein this Court held that "an officer of the Pueblo . . . is not protected by the tribe's immunity from suit," *id.* at 59 (citing *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 171-72 (1977); *Ex Parte Young*, 209 U.S. 123 (1908)). The United States Courts of Appeals have consistently followed *Santa Clara Pueblo* and held that where Congress has not abrogated tribal sovereign immunity, that immunity protects tribes, but leaves their officers open to suit under a tribal analogy to the doctrine of *Ex Parte Young*.[2]

2. *See, e.g., Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 954 (9th Cir. 2000) (holding that "suits for prospective injunctive relief are permissible against tribal officers under the *Ex Parte Young* framework" (citations omitted)); *Florida v. Seminole*

(Cont'd)

In this case, however, the interests of the tribe itself are at stake, and not the acts of any of its officers. *Cf. Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 282 (1997) (rejecting application of *Ex Parte Young* doctrine because "the declaratory and injunctive relief the Tribe seeks is close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe").

Petitioners cite to several cases interpreting the extent to which Congress has abrogated tribal sovereign immunity against suits for declaratory and injunctive relief under IGRA.[3]

(Cont'd)

*Tribe of Florida*, 181 F.3d 1237, 1244 (11th Cir. 1999) ("In *Santa Clara Pueblo*, 436 U.S. at 58-59, decided well before *Oklahoma Tax Commission* [*v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991)], the Court unequivocally upheld a tribe's immunity from a suit that sought only declaratory and prospective injunctive relief."); *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1262-64 (10th Cir. 1998) (holding that tribal sovereign immunity bars a suit "seeking a declaratory judgment" with regard to certain tribal water rights (citing *Santa Clara Pueblo*, 436 U.S. 49)); *United States v. Finn*, 919 F. Supp. 1305, 1340-41 (D. Minn. 1995).

3. *See Mescalero Apache Tribe v. State of New Mexico*, 131 F.3d 1379, 1385 (10th Cir. 1997); *Calvello v. Yankton Sioux Tribe*, 899 F. Supp. 431, 438 (D.S.D. 1995) (holding that "*Ross* [*v. Flandreau Santee Sioux Tribe*, 809 F.Supp. 738 (D.S.D. 1992)], *Rita, Inc.* [*v. Flandreau Santee Sioux Tribe*, 798 F. Supp. 586 (D.S.D. 1992)], and *Maxam* [*v. Lower Sioux Indian Community of Minnesota*, 829 F. Supp. 277 (D. Minn. 1993)] stand at most for the proposition that federal courts may find a waiver of tribal sovereign immunity *for the purpose of enforcing the provisions of the IGRA* where prospective injunctive relief, and not monetary relief, is sought" (emphasis added)); *Calvello v. Yankton Sioux Tribe*, 584 N.W.2d 108, 114 n.4 (S.D. 1998); *see also Smith v. Babbitt*, 875 F. Supp. 1353, 1361 & n.4 (D. Minn. 1995); *Davids v. Coyhis*, 869 F. Supp. 1401, 1406-07 & n.9 (E.D. Wis. 1994). Insofar as *Maxam*, 829 F. Supp. at 281-82, might be read to endorse abrogation outside the IGRA context, this suggestion has been rejected by district courts within the Eighth Circuit in *Calvello*, 899 F. Supp. at 438, and *Smith*, 875 F. Supp. at 1361, as well as implicitly by this Court's subsequent decision in *Kiowa Tribe*.

The Tribe respectfully submits that the extent to which Congress has abrogated or tribes have waived sovereign immunity under IGRA is wholly irrelevant to the decision of the Court of Appeals for the Ninth Circuit in this case. The court of appeals implicitly assumed, consistent with *Santa Clara Pueblo*, that the inherent sovereign immunity of tribes themselves is not limited to actions for damages. Its decision cannot be in conflict with the IGRA cases cited by Petitioners because it simply did not involve the question of the extent of IGRA's abrogation of tribal immunity, but rather the inherent limits of that immunity absent Congressional action.

The Tribe recognizes that dicta from the Fifth Circuit's decision in *TTEA*, 181 F.3d at 680-81, might potentially be read as stating that tribal sovereign immunity does not apply to claims seeking declaratory and injunctive relief. Careful examination of *TTEA*, however, reveals that the Fifth Circuit's opinion contains no actual holding that conflicts with the decisions of other Circuits to permit suits for declaratory and injunctive relief only against tribal officers and not against tribes in their sovereign capacity. This is so for three reasons.

First, any discussion of immunity in *TTEA* constitutes *obiter dicta* in light of the Ninth Circuit's ultimate conclusion that "the federal district court correctly concluded that it had no juri diction to entertain TTEA's action on the contract against the Tribe." *TTEA*, 181 F.3d at 685. *TTEA* involved a suit by a Texas corporation, naming both the Ysleta Del Sur Pueblo and several of its officers, seeking injunctive and declaratory relief. *See id.* at 680. It is true that after citing *Santa Clara Pueblo*, *Ex Parte Young*, *Seminole Tribe*, and Justice Stevens's concurrence in *Oklahoma Tax Commission*, the Fifth Circuit stated that "while the district court correctly dismissed the damages claim based on sovereign immunity, tribal immunity did not support its order dismissing the actions seeking declaratory and injunctive relief." *Id.* at 680-81. After making this statement, however, the court went on to affirm the district court's dismissal of the action against the Tribe for lack of

jurisdiction. *See id.* at 681-83. The Fifth Circuit's discussion of immunity is therefore *dicta*.

Second, careful reading of the court's language leaves considerable ambiguity as to whether it intended to abrogate the sovereign immunity of the tribe itself, as opposed to that of its officials:

> Though the defendants in *Puyallup* were not tribal officials, the Court cited it the next Term in finding a tribal governor not immune from a suit seeking declaratory and injunctive relief against enforcement of a tribal ordinance. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). Years later, Justice Stevens suggested that tribal sovereign immunity might not extend "to claims for prospective equitable relief against a tribe." *Oklahoma Tax Commission v. Potawatomi Indian Tribe*, 498 U.S. 505, 515 (1991) (Stevens, J., concurring).
>
> The distinction between a suit for damages and one for declaratory or injunctive relief is eminently sensible, and nothing in *Kiowa* undermines the relevant logic. State sovereign immunity does not preclude declaratory or injunctive relief against state officials. *See Ex Parte Young*, 209 U.S. 123 (1908). There is no reason that the federal common law doctrine of tribal sovereign immunity, a distinct but similar concept, should extend further than the now-constitutionalized doctrine of state sovereign immunity. *Cf. Seminole Tribe v. Florida*, 517 U.S. 44 (1996). In any event, *Santa Clara Pueblo* controls.

*TTEA*, 181 F.3d at 680-81. On the one hand, the *TTEA* court's citation of Justice Stevens' concurrence in *Oklahoma Tax Commission* and its general statement that "tribal immunity did not support [the district court's] order dismissing the actions seeking declaratory and injunctive relief," *id.* at 681, could be read to suggest the court sought to abrogate the immunity of

the tribe itself. On the other hand, the court's citation of *Santa Clara Pueblo*, which found sovereign immunity to bar declaratory and injunctive relief against a tribe but permit them against a tribal governor; its discussion of *Ex Parte Young* relief against *state officials*; and its statement that "*Santa Clara Pueblo* controls," more sensibly support the proposition that the court was indicating that, although dismissal of claims for relief against the tribe itself was proper, the district court should not have dismissed the actions seeking declaratory and injunctive relief *against the tribal officials*. Indeed, this is precisely how the United States District Court for the Eastern District of Texas has interpreted *TTEA*: "[R]ecent Fifth Circuit authority permits jurisdiction over individual members of the Tribal Council without the tribe's presence. Implicit within that holding is that tribal immunity does not automatically result in dismissal of the entire action." *Comstock Oil & Gas, Inc. v. Alabama and Coushatta Indian Tribes of Texas*, 78 F. Supp. 2d 589, 602-03 (E.D. Tex. 1999) (citing *TTEA*, 181 F.3d 676).

Finally, interpreting *TTEA* as abrogating tribal immunity would put it at odds with a recent decision of this Court. In *Kiowa Tribe*, 523 U.S. at 758-60, this Court, although questioning the historical basis and justifiability as a matter of policy of tribal sovereign immunity, acknowledged that the doctrine persists as defined by the Court, and that reductions in its scope, if any, are to be made by Congress. Thus, the doctrine of tribal immunity stands unless and until it is abrogated by Congress or waived by the tribe in question. *See id.* Having rejected the invitation to impose judicially-created limits on tribal immunity in *Kiowa Tribe*, the Court is now presented with another request for judicial abrogation of tribal sovereign immunity. In *Kiowa Tribe*, however, this Court recognized that Congress knows how to "alter [the] limits" of tribal sovereign immunity "through explicit legislation." *Id.* at 759 (citing *Santa Clara Pueblo*, 436 U.S. at 58). The Tribe submits that *Santa Clara Pueblo* and *Kiowa Tribe* make federal law on this point amply clear, and that this case presents no reason for the Court to revisit its decision to leave abrogation of tribal sovereign immunity to Congress.

## II. The Ninth Circuit's application of Federal Rule of Civil Procedure 19 has not decided an unsettled and important question of federal law, nor does its decision conflict with a relevant decision of this Court.

The decision whether to dismiss for failure to join an indispensable party under Fed. R. Civ. P. 19 requires two inquiries. First, the court determines whether the absent party is necessary. *See* Fed. R. Civ. P. 19(a). If a party is necessary but cannot be made a party, the court then proceeds to the four-part "equity and good conscience" inquiry of Fed. R. Civ. P. 19(b).

Here, Petitioners meld the inquiries under Fed. R. Civ. P. 19 as to necessity and indispensability[4] to argue that this case should go forward without the Tribe because the United States is an adequate representative of the Tribe's interests. The court of appeals disagreed, holding (1) that the Tribe is a necessary party; (2) that the United States is not an adequate representative so as to render the Tribe's joinder unnecessary; and (3) that the case must be dismissed because the Tribe is indispensable. This holding, which is based on the particular facts and laws involved in this case, is in conflict with no relevant decision of this Court.

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4. Petitioners imply that the question of whether the United States can adequately represent the interests of the Tribe is relevant to the determination pursuant to Fed. R. Civ. P. 19(b) as to "whether in equity and good conscience the action should proceed . . . or should be dismissed." Adequacy of representation, however, is relevant primarily to the question of whether a party's interests are adequately protected under Rule 19(a)(2)(i), and hence whether that party is necessary to the litigation. *See Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1496-97 (D.C. Cir. 1997); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990); *but see Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986). Regardless, however, of which subsection of Rule 19 is implicated, the Ninth Circuit's finding of inadequate representation is in conflict with no relevant decision of this Court.

**a. The decision of the Ninth Circuit that the Tribe is a necessary party to this litigation conflicts with no relevant decision of this Court.**

In its opinion below, the Ninth Circuit held that the Tribe is a necessary party, *see Manybeads II*, 209 F.3d at 1166, because it "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest," Fed. R. Civ. P. 19(a).[5] Petitioners seem to be raising questions about this holding on two grounds. First they imply that the Tribe does not have an interest relating to the subject of the action when they assert that "Petitioners do not seek . . . a declaration that the Tribe is not the beneficial owner of the HPL." Petition for Writ of Certiorari at 19 n.42. This misstates the record. The district court specifically found that Petitioners seek "the right for themselves and their heirs in perpetuity, to reside on the Hopi Reservation on what they consider their extensive customary use areas, with unlimited grazing privileges, the right to construct such buildings

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5. In *Clinton v. Babbitt*, 180 F.3d 1081, 1089 (9th Cir. 1999), the court, conducting a Rule 19(a) analysis in a separate case involving constitutional challenges by HPL Navajos to the terms of the Accommodation Agreement, held that

> Any relief accorded the plaintiffs will "as a practical matter impair or impede" the Tribe's ability to protect [its legally protected] interest in the HPL. *See* S. Rep. 104-363, at 34 (additional views of Sen. Pete Domenici) ("The Accommodation Agreement . . . is an integral and critical component of any settlement. Without the Accommodation Agreement, the Navajos on Hopi land would remain out of compliance and the threat of pending litigation could easily lead to more bitterness and distrust, more litigation and no resolution of this long-standing problem.").

If Petitioners prevail in this litigation, it is probable that HPL Navajos having signed Accommodation Agreements will refuse to comply with the terms of those Agreements, and further conflict will ensue, to the great detriment of both the Tribe and HPL Navajos.

as they wish, and to utilize unlimited water claimed necessary to their needs." *Manybeads I*, 730 F. Supp. at 1516. The Tribe submits that such a declaration threatens to render the Tribe's ostensible beneficial ownership of the HPL a nullity. There can be no doubt that the Tribe "claims an interest relating to the subject" of this action. *See Clinton*, 180 F.3d at 1089. That subject is, of course, control over land, water, and grazing rights with the HPL.

Second, Petitioners raise the issue as to when the United States can be an adequate representative of an absent Indian tribe. Adequate representation by a party to the litigation can, under some, circumstances, ensure that an absent person's ability to protect his interest is not impaired within the meaning of Rule 19(a)(2)(i). *See Makah Indian Tribe*, 910 F.2d at 558. Under certain circumstances the authorized participation of the United States in litigation on behalf of an Indian tribe can adequately prevent impairment of that tribe's ability to protect its interest. *See, e.g., Heckman v. United States*, 224 U.S. 413, 444-45 (1912). The Ninth Circuit's conclusion, however, that the particular facts and laws implicated in this case preclude such adequate representation under the "practical" test of Rule 19(a)(2)(i), is in conflict with no relevant decision of this Court.[6] As a practical matter, should Petitioners obtain a judgment adverse to the United States in the Tribe's absence, the Tribe, as a non-party, would have no right to appeal that judgment should the United States, for whatever reason, elect not to pursue its own appeal. *See Cherokee Nation*, 117 F.3d at 1497.

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6. Even assuming *arguendo* that the United States could ensure that the Tribe's ability to protect interest was not impeded in this action, the Tribe would still be a necessary party pursuant to Fed. R. Civ. P. 19(a)(1), which provides for joinder if "in the person's absence complete relief cannot be accorded among those already parties." The Ninth Circuit specifically found that "the Hopi Tribe qualifies as a necessary party under both parts of Rule 19(a)." *Manybeads II*, 209 F.3d at 1166. Petitioners fail to identify any decision of this Court that allegedly conflicts with the court of appeals' application of Rule 19(a)(1) to the facts of this case.

Nor can the Tribe be required to intervene at the cost of waiving its sovereign immunity. *See Wichita*, 788 F.2d at 775. The Court of Appeals properly found that the existence of an express statutory conflict of interest between the United States' trust duties to the Tribe and its duties to protect the rights and interests of HPL Navajos prevents adequate representation by the United States and creates a practical possibility that the Tribe's interest may be impaired or impeded. *See* Fed. R. Civ. P. 19(a)(2)(i).

Petitioners argue that the Ninth Circuit's holding that the United States may not adequately safeguard the Tribe's interest is in conflict with this Court's decisions in *Nevada v. United States*, 463 U.S. 110 (1983), and *Arizona v. California*, 460 U.S. 605 (1983). The holdings in those cases, however, are not relevant to the Ninth Circuit's decision in this case, for several reasons. *Nevada* and *Arizona* were both large-scale water rights adjudications, wherein the United States, pursuant to the doctrine of *Winters v. United States*, 207 U.S. 564 (1908), asserted, on behalf of one (in *Nevada*) or more (in *Arizona*) Indian tribes, water rights that the government had reserved for their reservations. *See Nevada*, 463 U.S. at 116; *Arizona*, 460 U.S. at 609-10. Neither case addressed whether Indian tribes were necessary parties under Rule 19, but rather examined whether tribes could relitigate the final adjudication of reserved water rights already asserted on their behalf by the United States. The Navajo-Hopi land dispute, however, presents very different relationships among the government, the tribes, and individual Indians.

The relevant inquiry in *Nevada* and *Arizona* was whether the government was legally authorized, for res judicata purposes, to represent the interests of an Indian tribe or tribes in water rights adjudication so as to preclude relitigation by the tribe or tribes of their reserved water rights. *See Nevada*, 463 U.S. at 134-35; *Arizona*, 460 U.S. at 626-27.[7] This case presents a

7. *Nevada*, 463 U.S. at 143-44, and *Arizona*, 460 U.S. at 625-26, both emphasized the special need for certainty and finality in determination of water rights. Here, by contrast, it is Petitioners who (Cont'd)

completely different question: Whether, when the United States is *not* authorized to assert the rights of Indian tribes in an intertribal dispute *and* bears specific statutory duties to a party adverse to a tribe, it can nevertheless, by participating in litigation in that tribe's absence, adequately safeguard the tribe's interests for purposes of Rule 19(a)(2)(i). Indeed, in *Arizona*, 460 U.S. at 613-15 & n.5, the Court specifically rejected the States' argument that "the presence of the United States insures adequate representation of the Tribes' interests" for purposes of the standards for permissive intervention under the Federal Rules of Civil Procedure. Therefore, statements in *Nevada* and *Arizona* concerning adequacy of government representation of tribes in the res judicata context do not dictate whether such representation is adequate for the distinct purposes of the joinder and intervention provisions of the Federal Rules of Civil Procedure.

Unlike the potential conflict of interest between the government's general trust duties to Indians and its broad role in pursuing reclamation, as discussed in *Nevada*, 463 U.S. at 127-28, this case involves a specific statutory command that the government advocate on behalf of the interests of HPL Navajos within the context of the Hopi-Navajo land dispute. *See* 25 U.S.C. § 640d-9(c) ("The Secretary shall take such action as may be necessary in order to assure the protection, until relocation, of the rights and property of individuals subject to relocation under" the 1974 Settlement Act and concomitant partition); *see also Hopi Tribe v. Watt*, 530 F. Supp. 1217 (D. Ariz. 1982), *aff'd*, 719 F.2d 314 (9th Cir. 1983). The principle that a tribe cannot relitigate water rights previously asserted on its behalf by the United States does not necessarily imply that the United States can substitute itself for the Tribe in an intertribal dispute when faced with statutorily-mandated duties

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(Cont'd)

are attempting, despite Congress's attempt to bring about a final resolution of this land dispute in the 1974 and 1996 Settlement Acts, to relitigate land claims already finally resolved by the courts.

to protect the very rights to the HPL asserted by the individual HPL Navajos.

Petitioners point to no court decision where the federal government, faced with conflicting trust obligations to *multiple Indian tribes*, has been deemed an adequate representative of one tribe or another in an intertribal dispute. Nor has *Nevada* ever been cited for the proposition that the government is an adequate representative of an Indian tribe, for Rule 19(a) purposes, in a dispute between different tribes or individual Indians and an Indian tribe. Although the United States in *Arizona* asserted water rights on behalf of multiple Indian tribes, that decision implicated no actual or potential *intertribal* conflicts. Here, the Secretary of the Interior must not merely "carry water on two shoulders," *Nevada*, 463 U.S. at 128, but must represent the specific interests of HPL Navajos in this very dispute.[8] In *Nevada*, by contrast, the government asserted water rights on behalf of a single tribe as against non-Indian claimants; it did not seek to represent conflicting tribal interests in an intertribal dispute.

Moreover, unlike its role in water rights adjudication, the United States is not authorized to assert the Tribe's rights in and to HPL lands. *Cf. Arizona*, 460 U.S. at 626-27. The 1974 Act provided an explicit program for adjudication of the rights of the Tribe and the Nation to the lands in dispute. Nowhere does it authorize the government to represent either or both the parties. Indeed, the statute is quite explicit in authorizing "[e]ither tribe, acting through the chairman of its tribal council for and on behalf of the tribe," to commence or defend actions against each other. 25 U.S.C. § 640d-17(a); *see also* 25 U.S.C.

8. *Cf. Wichita*, 788 F.2d at 775 ("Moreover, whatever allegiance the government owes the tribes as trustee, is necessarily split among the three competing tribes involved in this case. This case, therefore, falls squarely under the rule that when 'there is a conflict between the interests of the United States and the interests of Indians, representation of the Indians by the United States is not adequate.' " (quoting *Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977)) (further citations omitted)).

§§ 640d-1 to -5, -7. The government is simply not an adequate representative of the Tribe in this dispute; the very need for the enactment of the 1974 Act arose out of the failure of the government, over the course of many years, to protect the Tribe's interest in lands set aside for its use.

The Tribe has already made generous concessions to the HPL Navajos in exchange for its dismissal of its own claims against the Government. While in other contexts the Government has authorization and duty to assert the water rights of Indian tribes, under Rule 19(a)(2)(i) the inquiry is whether, "as a practical matter," representation by the government *may* impair or impede the Tribe's ability to protect its interests. Because the statutory scheme mandated for resolution of disputes over the HPL land imposes on the government a specific duty to protect the interests of the individual Petitioners in connection with this dispute, such impairment is very much a practical possibility. If this litigation is allowed to continue without the Tribe, the Tribe faces the possibility that the government, in order to settle Petitioners' claims, may press the Tribe to make even deeper concessions or may simply stop litigating. In light of the government's long history of compromising Hopi interests in the HPL, such can hardly be deemed adequate representation of the Tribe's interests.

**b. The decision of the Ninth Circuit that the Tribe's sovereign immunity requires dismissal under Rule 19(b) conflicts with no decision of this Court.**

The Ninth Circuit's application of the four-factor indispensability test set forth in Rule 19(b) conflicts with no relevant decision of this Court.[9] In assessing these factors,

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9. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or

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federal courts have generally found that "when an indispensable party is immune from suit, there is very little room for balancing of other factors, because immunity may be viewed as one of those interests compelling by themselves." *Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542, 548 (2d Cir. 1991) (citations and internal quotations omitted).[10] The Ninth Circuit, in effect, so held here. *See Manybeads*, 209 F.3d at 1166 (holding that Manybeads's free exercise claim "cannot be asserted when a sovereign, not a party to the case, will suffer substantially from its vindication").

The fact that dismissal of this suit will leave Petitioners without an equitable remedy in federal court implicates only application of the well-established doctrine of sovereign immunity and the standards of Rule 19(b). In the first place, this factor does not outweigh the potential prejudice to the Tribe,[11] the inadequacy of any judgment entered in its absence,

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> avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). The Court of Appeals found that only the fourth factor favors Petitioners. *See Manybeads II*, 209 F.3d at 1166.

10. *See, e.g., Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991) ("Some courts have noted, however, that when the necessary party is immune from suit, there is very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor."); *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989); *Wichita*, 788 F.2d at 777 n.13; *but cf. Davis v. United States*, 192 F.3d 951 (10th Cir. 1999) (holding that the sovereign immunity of an absent party does not wholly obviate the balancing of other factors); *Clinton*, 180 F.3d at 1089-91 (balancing Rule 19(b) factors despite the sovereign immunity of an absent party).

11. For the reasons set forth at pages 12-16, *supra*, the presence of the United States does not adequately mitigate the potential prejudice to the Tribe.

and the impossibility of shaping relief to avoid these problems. In the second place, Congress has elected, through the 1974 and 1996 Settlement Acts, to create a specific dispute-resolution mechanism for addressing the long and painful conflict between the Hopi and Navajo peoples over the use of the land at issue in this case. In that legislation, while providing for the protection of the HPL Navajos by the Secretary, Congress mandated that actions arising in respect of the partition are to be brought and defended *only* by the Tribes and their respective Chairmen on behalf of all tribal members. *See* 25 U.S.C. §§ 640d-7(a), (c); 640d-17(a), (c). Congress saw fit to abrogate the immunity of Tribe and Nation only with respect to proceedings between the sovereigns themselves, and not to suits by members of one against the other in its sovereign capacity. Thus, although dismissal of this lawsuit for inability to join the Tribe will leave Petitioners without an avenue for equitable relief in federal court, it is the very nature of sovereign immunity to leave some alleged wrongs without a remedy save for those remedies permitted by the sovereign. *See Santa Clara Pueblo*, 436 U.S. at 58. In the context of this case, it is clear that Congress's detailed remedial scheme under the 1974 Act precludes Petitioners' desired relief.

**III. The United States Court of Appeals for the Ninth Circuit did not rule on the question of whether the Tribe waived its sovereign immunity in this litigation either expressly or by estoppel. Additionally, Petitioners' waiver argument implicates neither an important and unsettled question of federal law nor the questions accepted for certiorari review in *C&L Enterprises, Inc. v. Citizen Potawatomi Nation*, No. 00-292.**

Petitioners did not present this argument in their briefs to the court of appeals, and thus that court did not rule on the question. Moreover, to the extent that Petitioners presented their argument below by making reference to the Hopi Tribe's participation in negotiation and settlement proceedings, this issue implicates only the application of an established rule of law to particular facts. That rule is the well-settled one

that "a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58-59 (citations and internal quotations omitted). The application of that well-established rule to the facts of this case does not justify review on a writ of certiorari.

First, it is readily apparent from the plain language of the Settlement Agreement that Section 10 of the Agreement pertains solely to enforcement of the provisions of the Agreement itself: "The United States and the Tribe hereby agree that the provisions of this Settlement Agreement shall be enforceable in either the United States Court of Federal Claims in Washington, D.C., or in the United States District Court in Phoenix, Arizona, as appropriate." S. Rep. 104-363 at 46. It simply defies reason to read this provision as representing an unequivocal waiver of immunity in a suit that seeks to enforce no provision of the Settlement Agreement—a suit that, to the contrary, seeks to dismantle the legal and practical foundations of that Agreement.

Second, Petitioners' implication that the Tribe's conduct in agreeing to what they repeatedly characterize as a "win-win" agreement for them somehow estops the Tribe from asserting sovereign immunity is groundless. First, such an implication flies in the face of the proposition that waivers of sovereign immunity must be explicit. Second, in allowing the plaintiffs the opportunity to both sign an agreement and pursue their appeal, the Tribe merely elected not to require plaintiffs to dismiss their appeal as a condition for entering into an Accommodation Agreement. Such a decision cannot reasonably be read as an unequivocal expression of intent to waive a legitimate sovereign immunity defense to that appeal.

Finally, the waiver question allegedly presented by this case has nothing in common with the question presented in No. 00-292, *C&L Enterprises, Inc. v. Citizen Potawatomi Nation*. In that case, this Court accepted for review two questions: one regarding the enforceability of an arbitration agreement contained in a contract executed by an Indian tribe for commercial construction outside of reservation or trust land

boundaries, and a second asking whether execution of such an arbitration agreement constitutes a waiver of sovereign immunity from a state court suit against the Indian tribe to enforce an arbitration award resulting from such arbitration proceedings. *See* Petition for Writ of Certiorari at i, *C&L Enterprises, Inc. v. Citizen Potawatomi Nation*, *cert. granted*, 121 S. Ct. 377 (Oct. 30, 2000) (No. 00-292).

The questions implicated in *C&L Enterprises* bear no connection to the question of whether the 1996 Settlement Agreement expresses an unequivocal waiver of tribal sovereign immunity with respect to suits other than those seeking to enforce that Agreement. In this case, there can be no credible claim that Petitioners are seeking to enforce any provision of the Settlement Agreement. *C&L Enterprises* is therefore wholly immaterial to the question of the Tribe's immunity as it bears on the Rule 19 issue in the instant lawsuit.

## CONCLUSION

This matter involves application of well-established rules of law interpreting Fed. R. Civ. P. 19 to the particular facts of the *Manybeads* litigation. The Ninth Circuit's application of law to fact conflicts neither with another court of appeals nor with a relevant decision of this Court. *Amicus curiae* the Hopi Tribe respectfully prays that the Petition for a Writ of Certiorari be DENIED.

Respectfully submitted,

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# APPENDIX

# APPENDIX — RELEVANT STATUTES AND ACT

## 25 U.S.C. § 640d-7(a) to (d)

### § 640d-7. Determination of tribal rights and interests in land

#### (a) Authorization to commence and defend actions in District Court

Either tribe, acting through the chairman of its tribal council for and on behalf of the tribe, is each hereby authorized to commence or defend in the District Court an action against the other tribe and any other tribe of Indians claiming any interest in or to the area described in the Act of June 14, 1934, except the reservation established by the Executive Order of December 16, 1882, for the purpose of determining the rights and interests of the tribes in and to such lands and quieting title thereto in the tribes.

#### (b) Allocation of land to respective reservations upon determination of interests

Lands, if any, in which the Navajo Tribe or Navajo individuals are determined by the District Court to have the exclusive interest shall continue to be a part of the Navajo Reservation. Lands, if any, in which the Hopi Tribe, including any Hopi village or clan thereof, or Hopi individuals are determined by the District Court to have the exclusive interest shall thereafter be a reservation for the Hopi Tribe. Any lands in which the Navajo and Hopi Tribes or Navajo or Hopi individuals are determined to have a joint or undivided interest shall be partitioned by the District Court on the basis of fairness and equity and the area so partitioned

shall be retained in the Navajo Reservation or added to the Hopi Reservation, respectively.

**(c) Actions for accounting, fair value of grazing, and claims for damages to land; determination of recovery; defenses**

**(1)** Either as a part of or in a proceeding supplementary to the action authorized in subsection (a) of this section, either tribe, through the chairman of its tribal council for and on behalf of the tribe, including all villages, clans, and individual members thereof, may prosecute or defend an action for the types of relief, including interest, specified in section 640d-17 of this title, including all subsections thereof, against the other tribe, through its tribal chairman in a like representative capacity, and against the United States as to the types of recovery specified in subsection (a)(3) of section 640d-17 of this title and subject to the same provisions as contained in said subsection, such action to apply to the lands in issue in the reservation established by the Act of June 14, 1934 (48 Stat. 960).

**(2)** In the event the Hopi Tribe or Navajo Tribe is determined to have any interest in the lands in issue, the right of either tribe to recover hereunder shall be based upon that percentage of the total sums collected, use made, waste committed, and other amounts of recovery, which is equal to the percentage of lands in issue in which either tribe is determined to have such interest.

**(3)** Neither laches nor the statute of limitations shall constitute a defense to such proceedings if they are either

prosecuted as a part of the action authorized by this section or in a proceeding supplemental thereto, if instituted not later than twenty-four months following a final order of partition and exhaustion of appeals in an action filed pursuant to this section.

**(d) Denial of Congressional interest in merits of conflicting claims; liability of United States**

Nothing in this section shall be deemed to be a Congressional determination of the merits of the conflicting claims to the lands that are subject to adjudication pursuant to this section, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

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**25 U.S.C. § 640d-7(a) to (e)**

**§ 640d-9. Partitioned or other designated lands**

**(a) Lands to be held in trust for Navajo Tribe; exception**

Subject to the provisions of sections 640d-8 and 640d-16(a) of this title, any lands partitioned to the Navajo Tribe pursuant to sections 640d-2 and 640d-3 of this title and the lands described in the Act of June 14, 1934 (48 Stat. 960), except the lands as described in section 640d-7 of this title, shall be held in trust by the United States exclusively for the Navajo Tribe and as a part of the Navajo Reservation.

*Appendix*

**(b) Lands to be held in trust for Hopi Tribe**

Subject to the provisions of sections 640d-8 and 640d-16(a) of this title, any lands partitioned to the Hopi Tribe pursuant to sections 640d-2 and 640d-3 of this title and the lands as described in section 640d-7 of this title shall be held in trust by the United States exclusively for the Hopi Tribe and as a part of the Hopi Reservation.

**(c) Protection of rights and property of individuals subject to relocation**

The Secretary shall take such action as may be necessary in order to assure the protection, until relocation, of the rights and property of individuals subject to relocation pursuant to this subchapter, or any judgment of partition pursuant thereto, including any individual authorized to reside on land covered by a life estate conferred pursuant to section 640d-28 of this title.

**(d) Protection of benefits and services of individuals subject to relocation**

With respect to any individual subject to relocation, the Secretary shall take such action as may be necessary to assure that such individuals are not deprived of benefits or services by reason of their status as an individual subject to relocation.

*Appendix*

**(e) Tribal jurisdiction over partitioned lands**

**(1)**[1] Lands partitioned pursuant to this subchapter, whether or not the partition order is subject to appeal, shall be subject to the jurisdiction of the tribe to whom partitioned and the laws of such tribe shall apply to such partitioned lands under the following schedule:

**(A)** Effective ninety days after July 8, 1980, all conservation practices, including grazing control and range restoration activities, shall be coordinated and executed with the concurrence of the tribe to whom the particular lands in question have been partitioned, and all such grazing and range restoration matters on the Navajo Reservation lands shall be administered by the Bureau of Indian Affairs Navajo Area Office and on the Hopi Reservation lands by the Bureau of Indian Affairs Phoenix Area Office, under applicable laws and regulations.

**(B)** Notwithstanding any provision of law to the contrary, each tribe shall have such jurisdiction and authority over any lands partitioned to it and all persons located thereon, not in conflict with the laws and regulations referred to in paragraph (A) above, to the same extent as is applicable to those other portions of its reservation. Such jurisdiction and authority over partitioned lands shall become effective April 18, 1981.

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1. So in original. Subsec. (e) enacted without a par. (2).

The provisions of this subsection shall be subject to the responsibility of the Secretary to protect the rights and property of life tenants and persons awaiting relocation as provided in subsections (c) and (d) of this section.

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**25 U.S.C. § 640d-17**

**§ 640d-17. Actions for accounting, fair value of grazing, and claims for damages to land**

**(a) Authorization to commence and defend actions in District Court**

Either tribe, acting through the chairman of its tribal council, for and on behalf of the tribe, including all villages, clans, and individual members thereof, is hereby authorized to commence or defend in the District Court an action or actions against the other tribe for the following purposes if such action or actions are not settled pursuant to section 640d-2 or 640d-3 of this title:

> **(1)** for an accounting of all sums collected by either tribe since the 17th day of September 1957 as trader license fees or commissions, lease proceeds, or other similar charges for the doing of business or the use of lands within the joint use area, and judgment for one-half of all sums so collected, and not paid to the other tribe, together with interest at the rate of 6 per centum per annum compounded annually;

(2) for the determination and recovery of the fair value of the grazing and agricultural use by either tribe and its individual members since the 28th day of September 1962 of the undivided one-half interest of the other tribe in the lands within the joint use area, together with interest at the rate of 6 per centum per annum compounded annually, notwithstanding the fact that the tribes are tenants in common of such lands; and

(3) for the adjudication of any claims that either tribe may have against the other for damages to the lands to which title was quieted as aforesaid by the United States District Court for the District of Arizona in such tribes, share and share alike, subject to the trust title of the United States, without interest, notwithstanding the fact that such tribes are tenants in common of such lands: Provided, That the United States may be joined as a party to such an action and, in such case, the provisions of sections 1346(a)(2) and 1505 of Title 28 shall not be applicable to such action.

**(b) Defenses**

Neither laches nor the statute of limitations shall constitute a defense to any action authorized by this subchapter for existing claims if commenced within two years from December 22, 1974, or one hundred and eighty days from the date of issuance of an order of the District Court pursuant to section 640d-2 or 640d-3 of this title, whichever is later.

**(c) Further original, ancillary or supplementary actions to insure quiet enjoyment**

Either tribe may institute such further original, ancillary, or supplementary actions against the other tribe as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands of the tribes by the tribes and the members thereof, and to fully accomplish all objects and purposes of this subchapter. Such actions may be commenced in the District Court by either tribe against the other, acting through the chairman of its tribal council, for and on behalf of the tribe, including all villages, clans, and individual members thereof.

**(d) United States as party; judgments as claims against the United States**

Except as provided in clause (3) of subsection (a) of this section, the United States shall not be an indispensable party to any action or actions commenced pursuant to this section. Any judgment or judgments by the District Court in such action or actions shall not be regarded as a claim or claims against the United States.

**(e) Remedies**

All applicable provisional and final remedies and special proceedings provided for by the Federal Rules of Civil Procedure and all other remedies and processes available for the enforcement and collection of judgments in the district courts of the United States may be used in the enforcement

and collection of judgments obtained pursuant to the provisions of this subchapter.

* * *

**Navajo-Hopi Land Dispute Settlement Act of 1996**
**§§ 1-4, 7, 11**

**Navajo-Hopi Land Dispute Settlement Act of 1996**

Pub.L. 104-301, Oct. 11, 1996, 110 Stat. 3649, as amended Pub.L. 105- 256, § 3, Oct. 14, 1998, 112 Stat. 1897, provided that:

**"Section 1. Short title.**

"This Act [amending sections 415 and 640d-24 of this title and enacting this note] may be cited as the 'Navajo-Hopi Land Dispute Settlement Act of 1996'.

**"Sec. 2. Findings.**

"The Congress finds that —

> **"(1)** it is in the public interest for the Tribe, Navajos residing on the Hopi Partitioned Lands, and the United States to reach a peaceful resolution of the longstanding disagreements between the parties under the Act commonly known as the 'Navajo-Hopi Land Settlement Act of 1974' (Public Law 93-531; 25 U.S.C. 640d et seq.) [this subchapter].

"**(2)** it is in the best interest of the Tribe and the United States that there be a fair and final settlement of certain issues remaining in connection with the Navajo-Hopi Land Settlement Act of 1974 [this subchapter], including the full and final settlement of the multiple claims that the Tribe has against the United States;

"**(3)** this Act [amending sections 415 and 640d-24 of this title and enacting this note], together with the Settlement Agreement executed on December 14, 1995, and the Accommodation Agreement (as incorporated by the Settlement Agreement), provide the authority for the Tribe to enter agreements with eligible Navajo families in order for those families to remain residents of the Hopi Partitioned Lands for a period of 75 years, subject to the terms and conditions of the Accommodation Agreement;

"**(4)** the United States acknowledges and respects —

> "**(A)** the sincerity of the traditional beliefs of the members of the Tribe and the Navajo families residing on the Hopi Partitioned Lands; and
>
> "**(B)** the importance that the respective traditional beliefs of the members of the Tribe and Navajo families have with respect to the culture

and way of life of those members and families;

"**(5)** this Act, the Settlement Agreement, and the Accommodation Agreement provide for the mutual respect and protection of the traditional religious beliefs and practices of the Tribe and the Navajo families residing on the Hopi Partitioned Lands;

"**(6)** the Tribe is encouraged to work with the Navajo families residing on the Hopi Partitioned Lands to address their concerns regarding the establishment of family or individual burial plots for deceased family members who have resided on the Hopi Partitioned Lands; and

"**(7)** neither the Navajo Nation nor the Navajo families residing upon Hopi Partitioned Lands were parties to or signers of the Settlement Agreement between the United States and the Hopi Tribe.

"**Sec. 3. Definitions.**

"Except as otherwise provided in this Act [amending sections 415 and 640d-24 of this title and enacting this note], for purposes of this Act, the following definitions shall apply:

"**(1) Accommodation.** — The term 'Accommodation' has the meaning provided that term under the Settlement Agreement.

"**(2) Hopi partitioned lands.** — The term 'Hopi Partitioned Lands' means lands located in the Hopi Partitioned Area, as defined in section 168.1(g) of title 25, Code of Federal Regulations (as in effect on the date of enactment of this Act) [Oct. 11, 1996].

"**(3) Navajo partitioned lands.** — The term 'Navajo Partitioned Lands' has the meaning provided that term in the proposed regulations issued on November 1, 1995, at 60 Fed.Reg. 55506.

"**(4) New lands.** — The term 'New Lands' has the meaning provided that term in section 700.701(b) of title 25, Code of Federal Regulations.

"**(5) Secretary.** — The term 'Secretary' means the Secretary of the Interior.

"**(6) Settlement agreement.** — The term 'Settlement Agreement' means the agreement between the United States and the Hopi Tribe executed on December 14, 1995.

"**(7) Tribe.** — The term 'Tribe' means the Hopi Tribe.

"**(8) Newly acquired trust lands.** — The term 'newly acquired trust lands' means lands taken into trust for the Tribe within the State of

Arizona pursuant to this Act [amending sections 415 and 640d-24 of this title and enacting this note] or the Settlement Agreement.

**"Sec. 4. Ratification of settlement agreement.**

"The United States approves, ratifies, and confirms the Settlement Agreement.

**"Sec. 7. Action to quiet possession.**

"If the United States fails to discharge the obligations specified in section 9(c) of the Settlement Agreement with respect to voluntary relocation of Navajos residing on Hopi Partitioned Lands, or section 9(d) of the Settlement Agreement, relating to the implementation of sections 700.137 through 700.139 of title 25, Code of Federal Regulations, on the New Lands, including failure for reason of insufficient funds made available by appropriations or otherwise, the Tribe may bring an action to quiet possession that relates to the use of the Hopi Partitioned Lands after February 1, 2000, by a Navajo family that is eligible for an accommodation, but fails to enter into an accommodation.

**"Sec. 11. Effect of this Act on cases involving The Navajo Nation and The Hopi Tribe.**

"Nothing in this Act [amending sections 415 and 640d-24 of this title and enacting this note] or the amendments made by this Act shall be interpreted or deemed to preclude, limit, or endorse, in any manner, actions by the Navajo Nation that seek, in court, an offset from judgments for payments received by the Hopi Tribe under the Settlement Agreement.